No. 14-915

In The
Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Respondents.

On Writ Of Certiorari To
The United States Court of Appeal
For The Ninth Circuit

BRIEF OF AMICI SOCIAL SCIENTISTS IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICI CURIAE

Richard B. Freeman, Eunice S. Han, and Joel Rogers are all academics with expertise in U.S. and comparative labor law, industrial relations, and labor markets. Freeman is the Herbert Ascherman Professor of Economics at Harvard University; Faculty Co-Director of the Labor and Worklife Program at the Harvard Law School; a Senior Research Fellow in Labour Markets at the London School of Economics' Centre for Economic Performance; and Director of the National Bureau of Economic Research / Sloan Science Engineering Workforce Projects. Han, a recent PhD in economics from Harvard, is a Visiting Lecturer in Economics at Wellesley College. Rogers, who also serves as Attorney of Record, is the Sewell-Bascom-Professor of Law, Political Science, Public Policy, and Sociology at the University of Wisconsin-Madison and Director of COWS.

Amici have no personal interest in the outcome of this case; their interest is in providing the Court the best available data and analysis of the economic and institutional effects of "agency fee" agreements. In the pleadings thus far, in particular in the *Brief of Amicus Curiae Mackinac Center for Public Policy* ("Mackinac") *in Support of Petitioners* ("Mackinac Br." *passim*), these have been misstated, in part but not only because inappropriate data has been used. *Amici* write to

correct these errors and give the Court a clearer picture of the facts.

This brief is submitted with the consent of the parties.[1]

SUMMARY OF ARGUMENT

1) Stipulations of Fact, Definition of Terms, Analytic Focus and Sources of Data, National Legal Terrain.

We stipulate that the education of American children is important to the strength of the U.S. economy and democracy. We further stipulate that in its formal provision, at the primary and secondary level, education is now overwhelmingly supplied by public school teachers, as it will be for the foreseeable future, and that the quality of education children receive in public schools makes a very big difference in their lives.

We define a "free-rider" as a person who benefits from some collective action but does not contribute

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curia*, of which their counsel is one, made a monetary contribution to its preparation or submission of the brief. Pursuant to Rule 37.3(a), all appropriate parties have filed letters granting blanket consent to the filing of *amici curiae* briefs.

to meeting its costs. We define a "CBA free-rider" as a person who makes no contribution to defraying union costs in securing and administering the benefits of a collective bargaining agreement ("CBA") that covers them — this is the free-ridership that the "agency fee" is meant to prevent. We define an "M&C free-rider" as a person who benefits from a "meet and confer" ("M&C") agreement about workplace arrangements between a union representing workers and an employer but makes no contribution to defraying union costs in furthering it. For any population, we define its "free-rider rate" as the number of such free-riders divided by the total "covered" population receiving such benefits.

Our focus is not on the law, but the organizational and economic effects of agency fees, or their termination. The data we use in our analysis is from the *Schools and Staffing Survey* for school districts and teachers ("SASS")[2] and the Current Population Survey ("CPS").[3] SASS will be our primary source. It uniquely allows us to answer the questions that arise from our focus above. It only covers teachers, but that does not concern us since teachers are "modal" for the population of employees with greatest interests here. They are

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[2] National Center for Education Statistics *Schools and Staff Survey*, https://nces.ed.gov/surveys/sass/index.asp (2015).

[3] United States Census Bureau and Bureau of Labor Statistics, *Current Population Survey*, http://www.census.gov/cps/ (2015).

the most numerous of all state and local public employees, and among the better organized.

State regulation of public sector labor relations is highly varied. We distinguish four types of legal regimes and Groups of states within them: those that (1) recognize an employer duty to bargain with a chosen union/exclusive bargaining representative and that also permit agency fees, (2) recognize that duty to bargain but prohibit agency fees, (3) are silent on the duty to bargain but permit bargaining, (4) prohibit collective bargaining of public school teachers. We also note (5) "right to work" (RTW) states as sometimes worth special attention. What defines them at RTW is their "open shop" policy in the private sector. But their attitude toward unions usually carries to the public sector, where they either prohibit collective bargaining entirely or ban agency fees.

2) The Incidence of Free-Riders is Much Greater Than Mackinac Suggests.

Mackinac's measure of the incidence of free-riders is inaccurate, and grossly underestimates its extent. Mackinac's measure relies exclusively on the CPS, which does not ask self-identified union members if they are covered by CBAs. Mackinac converts this gap in CPS data into an assumption that all union members are covered by CBAs. This unjustified assumption is demonstrably false. By artificially inflating the population of CBA-covered employees, Mackinac proportionately depresses its estimate of the free-rider rate. Instead of the CPS,

Mackinac should have used the SASS, which asks surveyed union members about their CBA coverage. Analysis of SASS data, which measures actual CBA coverage of union member teachers as well as their non-union colleagues, shows a much higher CBA free-riding rate than Mackinac reports.

3) **Mackinac's Claim That Abolishing Agency Fees Will Not Compromise Union Capacity to Meet "Duty of Fair Representation" Requirements is Unwarranted and Patently False.**

Mackinac's central conclusion, based in part on an examination of recent history in Michigan and Wisconsin but in larger part on the longer record of other RTW states — which almost all ban agency fees in the public sector as well as the private — is that "[u]nions are in fact able to fulfill the duty of fair representation whatever incentives workers might have to 'free ride' on the union when they do not face any agency fees" (Mackinac Br. at 14). But this conclusion is not warranted. Our analysis shows that under "open shop" conditions, unions will clearly have less capacity in bargaining and services, gain less for the workers they represent, and lose significant membership as a result. Unless the "duty of fair representation" is reduced to a purely procedural duty, without any substantive content, unions will be less able to meet it.

4) Abolishing Agency Fees Will Cost the General Population in Income, Equality, Growth, Public Revenue, and the Quality of Public Goods.

Our analysis has already shown a number of costs to moving to an entire open-shop public education system. These include obvious revenue losses to unions and income and other welfare losses to their members. But they include some less obvious costs as well. Union wage and compensation packages have positive spillover effects on non-union workers. They also contribute income to the broader community, which stimulates their economies and provides a source of government revenue. Union members, being better off economically, usually draw less on public welfare services. Finally, and most immediately, by making teaching jobs more attractive through higher wages, retaining more talented people in this profession, and — perhaps surprising to many — yielding greater disciplining and dismissal of unproductive teachers, unionization has positive effects on schooling quality. Making public education open-shop will reduce all these positive effects. It will not just be a blow to unions, but to education and the broader economy and society.

ARGUMENT

INTRODUCTION

Petitioners challenge the legality of the "agency fees" common to U.S. public sector labor relations — fees charged by a union to nonunion members of an employment unit for some of its costs in negotiating and administering a collective bargaining agreement (CBA) that covers them.

For nearly 40 years now, from *Abood v. Detroit Bd. of Education,* 431 U.S. 209 (1977) through *Harris v. Quinn* 134 Sc.D. 2618 (2014), this Court has repeatedly affirmed that agency fees limited to the "chargeable costs" of such CBA bargaining and administration are perfectly legal, and do not unconstitutionally burden the First Amendment rights of those who are forced to pay them. Indeed, the Court has rightly and repeatedly found agency fees to be a critical part of ensuring stable and productive labor relations with the millions of Americans covered by public sector CBAs. Their payment tends to reduce friction within the workforce, moderate union demands, and, by stabilizing the union financially, make it a more reliable partner to the employer in their shared workplace administration. Without the ability to impose an agency fee on non-members, public sector unions would face debilitating "free-rider" problems. Free-rider problems reduce union capacity, then performance, then the commitment of workers to them, in a downward and reinforcing

cycle, with unstable and inefficient labor relations at its terminus.

Space does not permit a full inventory of the many features of the American industrial relations system that concatenate and combine to give agency fees such importance in the U.S. system as compared to others. But we note a few.

The U.S. system centers on enterprise bargaining — as against more sectoral or national bargaining common in the industrial relations systems in many other countries. CBAs in the U.S. are generally firm-specific or even department- or establishment-specific within a single firm. The union's support and capacity within those particular firms, departments, or establishments is decisive to its ability to successfully represent and advance the interests of the employees within them. In other nations' industrial relations systems, such local and particular power is typically leveraged, or even elided and displaced, by more encompassing organizations and practices — stronger national union federations, general government social programs delivered through unions, direct political support, extension laws, legal protection of union concertation across employers, stronger protections of the right to use economic force against the employer, *inter alia*. Very few to none of these exist in the U.S.

Another key feature is that the U.S. has, in comparative terms, an extremely low "social wage" — public benefits and services available to all,

irrespective of their particular employer. Instead, we have a predominantly "corporate" welfare state, with most benefits as well as wages decided on an individual employer basis. This makes what happens in those local and particular settings all the more important for workers within them. And it increases costs to unions by demanding staff and expertise in negotiating, and then servicing, CBAs that are, in comparative terms, unusually broad in their range of governed issues. This underscores the importance to unions of being able to count on getting those costs covered, largely through local dues.

The most salient and proximate reason for the importance of agency fees, however, is the U.S. requirement that any union, once chosen as the "exclusive bargaining representative" of employees in a given employment unit, also satisfy a "duty of fair representation" to all employees within it, whether union members or not. This duty distinguishes our law's treatment of unions from, for example, its treatment of Parent Teacher Associations, the Sierra Club, or other service or advocacy organizations, which have no obligation of any kind to nonmembers. In effect, our law defines the CBA as a unit-specific "public good." Covering all workers in a particular unit, its administration, too, including ancillary efforts such as pursuing a grievance to outside arbitration must be done in a way that shows no discrimination by membership status.

As with any public good, discharging the duty of fair representation confronts unions with the "free-rider" problem made famous 50 years ago by M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965). Since the good (here, the CBA) is available to all, irrespective of their contribution to securing it, individuals governed only by the norms of "economic rationality" — which dictate that no action be undertaken unless the marginal return to doing so exceeds the net marginal cost of taking it — have no reason to contribute to its initial production or maintenance. Contribution definitionally has costs, but ensures no additional benefit. Non-contribution ensures zero cost, but does not reduce benefit. So, *homo economicus* will choose to take the good without contributing, to "free ride" on the work of others. Of course, if everyone chose to free-ride in this way, the good would not be produced in the first place. If nobody (or not enough people) is willing to carry their share of those costs, it simply will not be produced. Equally, if a great enough share of the benefiting population chooses to free-ride on an established public good, the stability and quality of the good's provision will be threatened.

Abood and its progeny effectively amount to Court recognition of this problem; and of the government's hand in creating it through its imposition of the duty of fair representation, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part); and of the wisdom of allowing state and local governments, and their

public sector unions, by mutual agreement, to use the agency fee as a way of solving it.

Other national systems, as suggested above, have other ways of solving this problem or reducing its effect — through different definition of the mandatory topics of bargaining, the scope of collective agreements, the level of their execution, the breadth of their extension, the obligations of union representation, and a myriad of external legal and institutional supports to unions and their concerted action, and corresponding restrictions on employers. But we are not here considering the benefits or costs of importing such foreign practice to U.S. public sector industrial relations. The proposal to the Court is "only" about removing the current agency fee aspect of it.

But it is the fact that the proposal considers only the removal of the right for unions and employers to sign agency agreements if they wish that underscores its radicalism. However small a part of the very complicated American public sector labor relations machine, the agency fee is its lynchpin. Pull that lynchpin out and the whole machine behaves very differently, or crashes, putting at risk the welfare of millions who depend on its functioning.

1. Stipulations of Fact, Definition of Terms, Analytic Focus and Sources of Data, National Legal Terrain.

Stipulations of Fact — We stipulate that quality education, including at the primary and secondary levels of schooling, is vital to the health of the US economy and America's democratic political system and broader civic culture.[4] We stipulate as well that the overwhelming share of such primary and

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[4] On the contribution made by a good primary and secondary educational system to national economic performance, *see* National Academy of Sciences, 2015, *Preparing for the 21st Century: The Education Imperative* (http://www.nas.edu/21st/education/). For the importance attached to schooling's civic contribution in the early years of this nation, *see* C. E. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860* (1983). For contemporary evidence of such contribution, *see* T. S. Dee, *Are there civic returns to education?*, Journal of Public Economics 88:1697-1720 (2004); K. Milligan, E. Moretti, and P. Oreopoulos, *Does education improve citizenship? Evidence from the United States and the United Kingdom*, Journal of Public Economics 88:1667-1695 (2004). For the relative importance of education's contribution to the economy and society, we leave the last word to Durkheim: "It is necessary that we never lose sight of what is the aim of public education. It is not a matter of training workers for the factory or accountants for the warehouse, but citizens for society." See E. Durkheim, *"Fouillée, A., La Propriété sociale et la démocratie,"* Revue Philosophique XIX: 446-453, 449 (1885) ("Il ne faut jamais perdre de vue quel est le but de l'instruction publique. Il s'agit de former non des ouvriers pour la fabrique ou des comptables pour le magasin, mais des citoyens pour la société.")

secondary schooling in America is provided by public school teachers.[5]

Definition of Terms — We define a "free-rider" as anyone who benefits from collective action without helping to defray its costs. The agency fee is intended to curb what we will call a "CBA free-rider," an employee covered by a Collective Bargaining Agreement (CBA) who does not contribute the union cost of negotiating and administering it. We define an "M&C free-rider" as an employee who benefits from a "meet and confer" (M&C) process but does not contribute anything to the union that precipitated and led it. We define the "free-rider rate" for any group of workers as the number of such free-riders divided by benefiting population, which includes the free-riders and those contributing.

Analytic Focus and Sources of Data — Our analytic focus is on the organizational and economic effects of the presence or absence of agency fees. We

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[5] Of the 3.5 million full-time-equivalent elementary and secondary school teachers projected to be engaged in classroom instruction in the U.S. in Fall of 2015, 3.1 million (89%) were public school teachers and 0.4 million (11%) private ones. Of the estimated 55 million children enrolled in PK-12th grade classes in the U.S. at that time, approximately 50.1 million (91%) children were enrolled in public PK-12, while 4.9 (9%) were enrolled in private. *See* National Center for Educational Statistics, *FastFacts*, Table 208.20 (at http://nces.ed.gov/programs/digest/d13/tables/dt13_208.20.asp (2015).

concentrate particularly on those effects among public school teachers.

Our basic data sources are the Current Population Survey (CPS) and the Schools and Staffing Survey (SASS), *supra* at 3. The CPS is a longstanding joint project of the Commerce Department's Census Bureau and the Labor Department's Bureau of Economic Analysis. Administered monthly to a very large sample of the adult population, it is an indispensable source of demographic and economic information on them. The SASS, administered by the Department of Education's National Center for Education Statistics, may be less familiar. As explained on its website:

> The Schools and Staffing Survey (SASS) is a system of related questionnaires that provide descriptive data on the context of elementary and secondary education and policymakers a variety of statistics on the condition of education in the United States. The SASS system covers a wide range of topics from teacher demand, teacher and principal characteristics, general conditions in schools, principals' and teachers' perceptions of school climate and problems in their schools, teacher compensation, district hiring and retention practices, to basic characteristics of the student population.

SASS,
https://nces.ed.gov/surveys/sass/overview.asp.

For purposes of our analysis of agency fees, including the incidence of the free-riding they are designed to thwart, SASS is the vastly superior dataset to use. Unlike the CPS, the SASS asks union members if they are covered by a CBA, and also enables determination of the number of agency-fee payers. SASS, unlike the CPS, also reports the incidence and beneficiaries of M&C. It, uniquely, enables determination of the CBA- or M&C-covered populations, and the number of free-riders within them.

The SASS is also a multi-level dataset, in which teachers are grouped within their schools and schools are grouped within their corresponding districts. It provides a way to construct a district-teacher matched dataset which offers insights into the general condition of U.S. public education that CPS cannot provide. We also merge information from the Local Education Agency (School District) Finance Survey, also administered by the NCES, with the SASS,[6] so that all our datasets include districts' finance information, allowing us to examine the union effects among districts with similar financial status. This, too, of obvious importance in determining the organizational finance effects of free-riding, is impossible to do with the CPS.

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[6] National Center for Education Statitsics, *Local Education Agency (School District) Finance Survey* (https://nces.ed.gov/ccd/f33agency.asp) (2015).

Our reliance on the SASS requires that we concentrate our analysis on public school teachers, as against other states and local public employees. Since SASS is the only dataset that permits precise answers to the questions that concern us, there really is no intellectually honest alternative to this narrowing. But we note that we are not troubled by it. Such teachers, of course, are the target petitioners in this case, and the chief providers of educational services that make it of great interest to those unconcerned with labor unions. And teachers are clearly "modal" for the broader class of state and local government employee union members or agency-fee payers who have the most immediate at stake in its decision. Their ranks are by far the biggest within it, and they are among the most organized.

National legal terrain — In the U.S., states have the power to set the terms of state and local government employee relations. Exercise of that power over a vast and diverse country — with tremendous local variation in history, political culture, levels of economic development, and all demography — has naturally led to tremendous variation in those terms, including variation in the treatment of different occupations (e.g., police, firefighter, teacher) within the broad class of state and local government employees. With more than a 100 state statutes on the subject, this is a complicated legal terrain.

We can however distinguish four basic sets of rules, or legal regimes, governing bargaining of public

school teachers. Table 1 reports the key elements of each of these regimes, the states, and the share of public school teachers in each regime, as of 2010.

Regime Group 1 are states that recognize the employer's duty to bargain with a chosen exclusive representative/union and also permit agency fees. Group 2 are states that recognize that employer bargaining duty but prohibit agency fees. Group 3 are states that are silent on the duty, but allow collective bargaining to go on. Group 4 are states that prohibit collective bargaining of public school teachers.

Group 5 in the table, "Right to Work" (RTW), has state members drawn from Groups 2-4. RTW, of course, is about private sector bargaining, not public. What defines a state as RTW is its decision, protected under Section 14(b) of the Labor Management Relations Act, 29 U.S.C. § 164(b), to ban the "union shop" — where union membership is required of continued employment in an employment unit covered by a CBA containing this "union security clause" — in favor of an "open shop" free of security clauses. We add the RTW states as a distinct Group in a table focused on the public sector, however, because the policy preferences RTW states show in the private sector are applied

Table 1:
Four Public Sector Bargaining Legal Regimes
+
"Right to Work"

	Regime	States
Group 1 (47 % of teachers)	Recognizes an employer duty to bargain and permits agency fees	AK, CA, CT, DE, HI, IL, ME, MD, MA, MN, MT, NH, NJ, NM, NY, OH, OR, PA, RI, VT, WA, WI
Group 2 (17 % of teachers)	Recognizes an employer duty to bargain but prohibits agency fees	FL, ID, IN, IA, KS, NE, NV, ND, OK, SD, TN
Group 3 (21 % of teachers)	Silent on employer duty to bargain but permits collective bargaining	AL, AR, CO, KY, LA, MO, UT, WV, WY
Group 4 (15 % of teachers)	Prohibits collective bargaining, at least for state employees	AZ, GA, MS, NC, SC, TX, VA
Group 5 ("Right to Work")	Prohibits bargaining or, where not, prohibits agency fees	AL, AR, AZ, FL, GA, IA, ID, IN, KS, LA, MS, NC, ND, NE, NV, OK, SC, SD, TN, TX, UT, VA, WY

Source: The legal regimes are adapted from Terry M. Moe, *Special Interest: Teachers Unions and America's Public Schools*. (2011), Table 2-2, pp. 54-55; teacher data from SASS.

universally in the public one.[7] All states that ban collective bargaining of public school teachers are RTW. And all of the remaining RTW states ban agency fees.

Table 1 shows that nearly half of U.S. public school teachers are in the relatively "union-friendly" Group 1 — again, states which recognize the duty to bargain and allow agency fees. Just over half are in less supportive, and sometimes hostile, bargaining environments. All Groups permit M&C, which may result in agreements on work rules and compensation schedules not entirely unlike those founds in CBAs — with the important difference

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[7] This should not surprise. RTW, after all, is first and foremost a political movement aimed at weakening unions, wherever they may appear. For some of its storied political history, *see* G. J. Gall, *The Politics of Right to Work: The Labor Federations as Special Interests, 1943-1979* (1988); J. A. McCartin and J-C. Vinel, *Compulsory Unionism: Sylvester Petro and the Career of an Anti-Union Idea*, in N. Lichtenstein and E. T. Shermer, eds., *The American Right and U.S. Labor: Politics, Ideology, and Imagination*, 226-251 (2012); M. Dixon, "Limiting Liberalism: Business Political Mobilization and Union Setback in the States, 1944-1960," Journal of Policy History 19 (2007); K. Phillips-Fein, *As Great an Issue as Slavery or Abolition: Economic Populism, the Conservative Movement, and the Right-to-Work Campaigns of 1958*, Journal of Policy History 23:4 (2011); E. T. Shermer, *Counter-Organizing the Sunbelt: Right-to-Work Campaigns and Anti-Union Conservatism, 1943-1958*, Pacific Historical Review 78(1): 81-118 (2009);, and W. Canak and B. Miller, *Gumbo Politics: Unions, Business, and Louisiana. Right-To-Work Legislation*, Industrial & Labor Relations Review January 43: 258-271 (1990).

that, and definitive of M&C practice, their terms are not legally enforceable.

2. The Incidence and Importance of Free-Riders is Much Greater Than Mackinac Suggests.

In minimizing the dangers of overruling *Abood*, Mackinac seeks to minimize the importance of free-riders. It is helped in doing so by using the wrong data, neglecting the essential of agency fee payment, and ignoring large areas of employer-union collaboration, including M&C.

To begin with the data mistake, Mackinac relies exclusively on the CPS. This survey asks those not belonging to a union if they are covered by a CBA, but does not ask that question of union members. This gap invites the assumption that all union members are covered by a CBA. But this assumption, as we show below in Table 2, is clearly wrong. If an analyst makes this assumption, the effect will be to artificially inflate the appropriate denominator in calculating the free-rider rate, namely the CBA-covered population, and thereby reduce that rate.

Mackinac makes this assumption. Mackinac's tables of "union membership rates among state and local gov't employees covered by CBAs" (Mackinac Br. at 20, 29-30, 36-37) all reflect this, as does its description of the calculation for this rate (*id.*, at 35 n. 52).

What does it find? Mackinac looks at these rates for two sets of states, both over the 2000-2014 period. The first is Michigan and Wisconsin. Both of these states, in 2010, fell squarely into our Group 1 from Table 1 — states that recognizes a duty to bargain and permit agency fees. Mackinac reports that the union member share of the CBA-covered population rose to as high as 98.4% in Michigan in 2008, and averaged above 95% across both states across the whole of the period examined.

The second group Mackinac examines is a sub-group (FL, ID, IA, KS, NE, NV, ND, and SD) of our Table 1 Group 2 — states that recognize the duty to bargain, but prohibit agency fees. Mackinac reports its average union member share of the CBA-covered population to be 79%, and trending upward, with a 2009 high of 82.8%, and 2014 coming in at 81%. Since these states prohibit agency fees, this implies that the Mackinac free-rider rate is 21% over the period (1 – .79), and 19% in 2014 (1 – .81).

But the assumption that all public sector union members are covered by CBAs is wrong. Again using some of the Table 1 Groups, Table 2 shows the percentage of CBA-covered unionized teachers, by Group, at three points in time: 2003-2004, 2007-2008, and 2011-2012.

Unionized teachers in the most union-friendly environment, Group 1, indeed show very high, though steadily declining, rates of coverage. Consistently below them, and also declining in

rates of coverage, are union members in Group 2. A substantial drop-off in CBA coverage is registered in Group 3, and effectively disappears entirely in Group 4. But in no case is it the case that *all* union members have CBA coverage. So the basis for Mackinac's calculations is simply wrong.

Table 2:
Union Member CBA Coverage, Year and Regime Group

	Union Members Covered By CBAs			
	Group 1	Group 2	Group 3	Group 4
2003-2004	95.6%	87.6%	26.7%	0%
2007-2008	90.4%	85.1%	19.6%	0%
2011-2012	88.6%	83%	26.4%	0%

Note: Group 1 are states that recognize a duty to bargain and allow agency fees; Group 2 are states that recognize duty to bargain but prohibit agency fees; Group 3 are states that are silent on the duty to bargain but allow collective bargaining; Group 4 are states that prohibit collective bargaining, at least for state employees.
Source: The SASS, authors' calculations.

The SASS data, which Mackinac should have used, enable us to give a better account. They permit precise specification of the total CBA-covered population and its components: dues paying union members, agency-fee paying nonmembers (which Mackinac effectively ignores), and free-riders.

The results of our SASS analysis are reported in Table 3. It shows that in Group 1, union members make up 92% of the covered population (as compared to Mackinac's 95%), joined by 8% who are

non-members but who pay the required agency fee, yielding zero free-riders. In Group 2, the union-member share of the CBA-covered population falls to 66% — as compared to Mackinac's reported 79% — and the free-rider rate rises to 34%, or 13 percentage points and 62% higher than Mackinac's implied free-rider rate of 21% (or, for 2014, 15 percentage points, 79% higher, than Mackinac's implied free-rider rate of 19%). In Group 3, the union member share is 65% and the non-union and free-riding share rises respectively to 35% and 35%.

Table 3:
Coverage and Free-Rider Rates by Group

	Group 1	Group 2	Group 3
Number of all CBA-covered teachers	12,520	4,710	2,510
% of union member teachers covered	92%	66%	65%
% of all covered teachers who are not members	8%	34%	35%
Free-rider rate	0%	34%	35%

Note: Group 1 are states that recognize duty to bargain and allow agency fees; Group 2 are states that recognize duty to bargain but prohibit agency fees; Group 3 are states that are silent on the duty to bargain but allow collective bargaining
Source: The SASS 2011-2012, authors' calculations.

Clearly, the presence or absence of agency fees has a big effect, and Mackinac is way off in its calculations of the free-rider rate.

Table 4 takes another look at CBA-coverage by Group identified in Table 1. Here we report results for Groups 1-3, but also include our Group 5, the RTW states. The table shows that union member CBA coverage under the "open shop" rules of RTW falls dramatically, from 89% in Group 1 to 30% in Group 5 — a 59 percentage point, or 66% decline. Overall CBA coverage drops even more, from 88% to 27% — a 61 percentage point, or 69% decline. Not just union members, apparently, are hurt. This

Table 4:
CBA-Coverage of Union and Nonunion Teachers, by Group

	Group 1	Group 2	Group 3	Group 5
% of teachers covered by CBAs	88%	84%	37%	27%
Number of union members	15,250	4,040	4,830	7,660
Number of non-members	2,180	2,170	3,210	6,940
% of union members covered	89%	84%	42%	30%
% of non-members covered	52%	84%	29%	22%

Note: Group 1 are states that recognize duty to bargain and allow agency fees; Group 2 are states that recognize duty to bargain but prohibit agency fees; Group 3 are states that are silent on the duty to bargain but allow collective bargaining; Group 5, RTW states, prohibit bargaining or, where not, prohibit agency fees
Source: The SASS 2011-2012, authors' calculations

fact, too, the absolute decline in beneficial coverage, is not observed by Mackinac.

Table 5 turns to the M&C practice that all states allow, to which unions devote considerable time and expense, but that Mackinac also ignores.

M&C incidence is limited in our Groups 1 and 2, but rises dramatically in important in Groups 3 and 5. Again, since M&C does not result in formal CBAs; the agreements they produce are not legally enforceable. But that hardly prevents free-riding, since unions typically lead representation and negotiation of those agreements, and have a huge role in their administration. In Groups 3 and 5, M&C free-riders, rise to as high as 32% and 43%, respectively, of those covered. In Group 2, where M&C is admittedly more limited, it rises to 44%.

Table 5:
Percent of Union Members and Non-Members Who Are Covered by M&C, by Group

	Group 1	Group 2	Group 3	Group 5
% of union members covered by M&C	7%	5%	19%	11%
% of non-members covered by M&C	7%	6%	15%	9%
% of union-member teachers covered by M&C	93%	56%	68%	57%
% of non-member teachers covered by M&C	7%	44%	32%	43%

Note: Group 1 are states that recognize duty to bargain and allow agency fees; Group 2 are states that recognize duty to bargain but prohibit agency fees; Group 3 are states that are silent on the duty to bargain but allow collective bargaining; Group 4 are states that prohibit collective bargaining, at least for state employees; Group 5, RTW states, prohibit bargaining or, where not, prohibit agency fees.
Source: The SASS 2011-2012, authors' calculations.

These many, various, often dramatic, differences between our SASS-based calculations and Mackinac's CPS-based ones — on the union share of CBA and M&C coverage, the absolute level of CBA and M&C coverage across regimes, and the incidence of free-riding within and across them — make the point that Mackinac's false assumptions and incomplete coverage serve to grossly understate the incidence of the free-rider problem. And to understate incidence is to understate importance. Every free-rider, in a CBA-covered population, is one more person who must be served by the union, without more resources to do it. A 30-40% free-rider rate, of the sort seen above, means roughly 30-40% less money to serve the same population.

Mackinac's data and methods really are a problem. So is the free-rider.

3) **Mackinac's Claim That Abolishing Agency Fees Will Not Compromise Union Capacity to Meet "Duty of Fair Representation" Requirements is Unwarranted and Largely False.**

Mackinac's central claim is that unions have little to fear from the abolition of agency fees:

> Unions are in fact able to fulfill the duty of fair representation whatever incentives workers might have to "free ride" on the union by not

> paying agency fees. A financially destructive membership exodus is not inevitable at all.

Mackinac Br. at 14. But this conclusion is not warranted and, on the evidence just given, largely false. Our analysis shows that under increasing "open shop" conditions, free-ridership increases quite dramatically. This means that unions have less money to service the same number of members. Absolute coverage of both CBA and M&C benefits also falls. The union presence and contribution to worker welfare manifestly shrink. And that does, indeed, lead to membership loss, if not "mass exodus." The strength of unions is best measured by their density, the share of potential members they actually claim.

Looking at the same period Mackinac does, 2000-2014, what do the union density numbers tell us about the importance of agency-fees? Here, as an exception, we join Mackinac in using the CPS, and look at all state and local public employees, not just public school teachers. In states permitting or not barring agency fees, public sector density averaged 49.6 percent. In the states that do bar them, it averaged 17.4 percent.[8]

That 32.2 point, or 65 percent, difference in real union power more or less says it all. There is a significant scholarly literature on the effects of open-shop on the public sector, and its conclusion is

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[8] This calculation made using the CPS Outgoing Rotation Group (ORG). http://www.nber.org/data/morg.html.

one of the very points of absolute consensus we can report in interpretations of American labor law. Everybody agrees that abolishing agency shop would significantly hurt unions, the union wage premium, the positive effects of spillover to other workers, the likelihood of success in new organizing, and on and on.[9]

Against this literature, and our analysis here, and the informal testimony of many workers and union organizers whose lives revolve around unions representing or benefiting workers, Mackinac offers a bare assertion. Its evidence for its confidence in the claim is exactly the evidence gone over in the previous section. This, as we've seen, fails to use the correct data to make its point, much less successfully make it.

4) Abolishing Agency Fees Will Cost the General Population in Income, Equality, Growth, Public Revenue, and the Quality of Public Goods.

Unions and their members will not be the only ones to lose if *Abood* is overruled. By weakening public

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[9] I J. H. Keefe, *Eliminating Fair Share Fees and Making Public Employment "Right to Work" Would Increase the Pay Penalty for Working in State and Local Government* (2015); J. H. Keefe, *Laws Enabling Public-Sector Collective Bargaining Have not Led to Excessive Public-Sector Pay* (2015); and especially J.H. Keefe *On Friedrichs v. California Teachers Association: The inextricable links between exclusive representation, agency fees, and the duty of fair representation* (2015), for recent reviews.

sector unions, their many positive effects on other workers, and on our economy and society, will also be lost. This is so for teacher unions as much as any other, and we can make this point by returning to our focus on them.

We begin within wages and income. The loss of dues or agency fees from teachers who choose to free-ride on union members in states that ban agency fees should weaken the ability of unions to improve the economic status of teachers. In Table 6, comparisons between Group 1 and Group 2 states show that in Group 2 states: union density is much lower; union membership premium (defined as the percentage difference in the earnings of union members compared to non-members) is lower; and the effect of having greater union density in a school district is lower on teacher salaries though not on benefits. Union density is lowest in Group 5, where there are relatively low payoffs to union members and to teachers in districts with higher union density.

Does the increase in teacher pay associated with unions add dollars to an already highly-paid group of college graduates or does it reduce the gap between teaching and other professions and thus make teaching more attractive to young persons choosing a career?

The preponderance of evidence shows that teachers are paid less than comparable workers in other professions. Several researchers show that teachers' pay compares unfavorably with

compensation in other occupations that require similar preparation and education. Allegretto, Corcoran, and Mishel compared teachers' overall salaries to those earned by people in similarly skilled professions and concluded that teachers'

Table 6:
Union Effects on Salary and Fringe Benefits, by Group Type

SASS 2003-2012 pooled data	Group 1	Group 2	Group 3	Group 5
Weighted Union density	93%	61%	60%	49%
Effect of union member-ship on base salary	10.6%	2.5%	1.6%	2%
Effect of 10% increase in union density on base salary	1.7%	0.7%	0.4%	0.5%
Effect of 10% increase in union density on average benefit	3%	3.7%	3%	0%

Note: Group 1 are states that recognize duty to bargain and allow agency fees; Group 2 are states that recognize duty to bargain but prohibit agency fees; Group 3 are states that are silent on the duty to bargain but allow collective bargaining; Group 5, RTW states, prohibit bargaining or, where not, prohibit agency fees.
Source: The SASS 2003-2012 pooled data, authors' calculations.

weekly earnings were, on average, 12 percent less than those of architects, nurses, and accountants. S. Allegretto, S. Corcoran, and L. Mishel, *How Does Teacher Pay Compare? Methodological Challenges and Answers* (2004). They also found a long-run decline in relative teacher pay especially for women. The gap between female public school teachers and comparably educated women — for whom the labor market changed dramatically over the 1960–2000 period — moved from a wage *advantage* of 14.7 percent in 1960 to a *disadvantage* of 13.2 percent in 2000. Non-unionized teachers in the private sector have the largest pay gap (–32.1 percent); unionized public sector teachers have the smallest pay gap, but still a negative one (–13.2 percent), relative to comparable non-teacher workers. [10]

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[10] The question of just why the public school teachers are now so poorly paid has excited much work in the economics profession. One explanation, alluded to in text, is that it has simply sunk to its appropriate market price, given the explosion in job opportunities for college-educated women. But then it remains unclear why such a difficult profession, and such a valuable one for society, is valued so low. A quite different explanation is that the market fails to produce an efficient outcome. In most regional labor markets, there are a limited number of schools. Perhaps they are exploiting their quasi-monopsony buying power to push down wages. On this second theory, *see* J. H. Landon and R. Baird, *Monopsony in the Market for Public School Teachers*, The American Economic Review 61 (5): 966-971 (1971) finding that teacher salaries are lower where there are few school districts in an area; M. R. Ransom and D. P. Sims, *Estimating the Firm's Labor Supply Curve in a "New Monopsony" Framework: School Teachers in Missouri*, The Institute for the Study of Labor, (IZA) Discussion Paper No. 4271 (2009), arguing that

Table 7 shows that unionization improves the teacher pay of nonunion teachers not covered by a CBA. Such nonunion teachers in Group 1 earn 5-percent higher salaries than nonunion teachers in states that prohibit collective bargaining. In addition, a 10 percent increase in union density is associated with a 5.8 percent increase in base salaries in Group 1. Also, non-union teachers in Group 2, where agency fees are not allowed, earn 1% less than nonunion teachers in states that prohibit CB. An increase in union density in Group 2 brings a similar salary premium, as in Group 1. Thus, the overall pay increase for nonunion teachers is higher in Group 1 than in Group 2. The pattern for benefit premium is analogous to that of salary premium. Nonunion teachers receive higher benefits in districts where relatively more teachers are unionized. The average benefit of nonunion teachers in Group 1 is greater than that of nonunion teachers in Group 2.

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monopsony in Missouri is so exploited, especially for younger teachers; J. Luizer and R. Thornton, "Concentration in the Labor Market for Public School Teachers," *Industrial and Labor Relations Review* 39 (1986), making a like case for parts of Pennsylvania. If such arguments are accepted, of course, teachers unions might be making yet another contribution to social efficiency, by offsetting the effect of this market imperfection.

Table 7:
Unionization positive spillovers to nonunion teachers, by Group

SASS 2003-2012 pooled data	Group 1	Group 2	Group 3
Salary premium over states that prohibit collective bargaining	5%	-1%	1%
Effect of increasing union density by 10% on base salary	5.8%	6%	0%
Benefit premium over states that prohibit collective bargaining	5.3%	2.1%	2.7%
Effect of increasing union density by 10% on average benefit	1.1%	1.4%	3.5%

Note: Group 1 are states that recognize duty to bargain and allow agency fees; Group 2 are states that recognize duty to bargain but prohibit agency fees; Group 3 are states that are silent on the duty to bargain but allow collective bargaining.
Source: The SASS 2003-2012 pooled data, authors' calculations.

The results of Table 7 indicate that the increase in teacher compensation occurs not only for teachers who are unionized but also for teachers who are not unionized in the same district. In other words,

unions seem to have positive spillover effects on the entire teaching profession, and the magnitude of the spillover effects is greater where agency fees are allowed.

Thus, abolishing agency fees will decrease teacher union density, limit their ability to get wage and benefit improvements for their members, and reduce the magnitude of these positive spillover effects. Unionized teacher income has direct benefits for their surrounding community. It increases purchasing power and effective demand within those communities, which helps drive economic growth. And that, with characteristic multipliers, adds to more demand and more growth. This broad improvement in income and economic performance, in turn, can be expected to help state revenues, simply because there is more income to tax. And since those initially fueling this growth are better off, they will have an additional positive revenue effect by not needing to draw on government spending on the needy.

In its growth-promoting and revenue-enhancing effects, the positive spillover on wages and benefits to non-union colleagues should be thought of as simply an augment, or add-on, to the union teacher salary that began this familiar story. But the spillover has an additional positive effect. Since it typically goes to a colleague worse off than the one originating it, it tends to reduce income inequality, and thereby reduce the many ills that follow from inequality, from social envy and tension, to bad health, to social disorder and alienation.

In addition to all these effects, teachers unions have an additional and perhaps — given all the negative publicity they get — surprising positive effect on educational quality. We do not claim that simply having better wages and benefits, or the union membership or payment of agency fees that help produce them, improves individual teacher performance. We do claim a positive union effect of the quality of the teaching workforce, exerted through the schools and schools systems in which they work.[11] Unionization increases the ability of those institutions to recruit talented and dedicated teachers, and to retain them, and it speeds their removal of poor ones.

We know that good wages and working conditions will, in general, attract more people of talent to a job. To the very considerable extent that teachers unions improve those wages and working

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[11] On individual teacher effects, *see* R. Chetty, J. N. Friedman, and J. E. Rockoff, *The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood*, NBER Working Paper Series, Working Paper 17699 (http://www.uaedreform.org/wp-content/uploads/2013/08/Chetty-2011-NBER-Long-term-impact-of-teacher-value-added.pdf (2011) and E. A. Hanushek, *The economic value of higher teacher quality*, Economics of Education Review 30:466-479 (http://www.sciencedirect.com/science/article/pii/S0272775710001718) (2011). On the huge — and, in recent American discussion, oddly neglected — importance of school effects, *see* R. B. Freeman and M. Viarengo, *School and family effects on educational outcomes across countries*, Economic Policy 29(79):395-446 (2014).

conditions, which we have seen they do, that means unionized schools will be better able to attract talent. We know as well that one of the great virtues of unions is their giving workers an opportunity for "voice" and not merely "exit" in dealing with workplace concerns. One central and positive effect of that is that they lower wasteful turnover by improving retention. And we know this to be true of teachers unions.[12] But thirdly, and surprising to all who have heard the many stories of teachers unions defending the employment of bad teachers, unionized schools and schools systems are quicker to get rid of bad teachers than

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[12] R. Freeman argues that, compared to non-union workers, union workers are less likely to quit their jobs mainly because they can take advantage of the collective "voice" effect in the unionized setting. R. B. Freeman, in *The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits, and Separations*, Quarterly Journal of Economics 94 (4): 643-673 (1980). R. W. Eberts, in "Union-Negotiated Employment Rules and Teacher Quits," *Economics of Educational Review* 6 (1987), shows that the probability of teacher attrition is lower in districts that have collective bargaining agreements. D. I. Rees, in *Grievance Procedure Strength and Teacher Quits*, Industrial Labor Relations Review 45 (1): 31-43 (1991), finds a negative association between the strength of grievance procedures and teacher attrition. E. Han, in *The Myth of Unions' Overprotection of Bad Teachers: Evidence from the District-Teacher Matched Panel Data on Teacher Turnover*, Labor and Worklife Program at Harvard Law School Working Paper (download at http://www.law.harvard.edu/programs/lwp/ (2015), estimated that teachers in school districts that are covered by collective bargaining are three percent less likely to quit teaching compared to teachers in school districts with no agreement with unions.

non-union ones. *Eunice Han, The Myth of Unions' Overprotection of Bad Teachers, Evidence from the District-Teacher Matched Panel Data on Teacher Turnover, supra* n.12. The most obvious explanation for this is that the unionized teachers are more expensive, so managers are less likely to put up with unproductive assets.

Put better attraction, better retention, and better removal (dismissal) practices together, and you have a more functioning, productive, and quality teaching force.

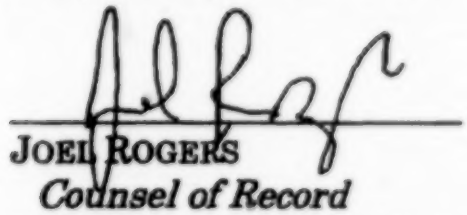
So, and returning to our opening stipulations about education's importance to the country, and public school teachers' importance to education, we can say this. Overruling *Abood* will not only hurt teacher unions and other unions, and unionized and nonunion teachers and other workers, it will (at the margin, to be sure) slow growth and increase inequality. Given the agency fee's lynchpin role in American labor relations, it will carry a vast amount of collateral institutional damage in its train, and quite generally raise workplace tensions, encourage destructive bargaining strategies, and otherwise sacrifice the myriad gains to productivity that come from mutually respectful and predictable labor-management relations. It will also, in the ways just suggested, frustrate progress on what nearly every American agrees is a signally important common goal — improving the quality of the education our children get in primary and secondary schools.

CONCLUSION

The judgment below should be affirmed.

Dated this 13th day of November, 2015.

Respectfully submitted,



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